IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 680 of 1999

WITH

CRIMINAL APPEAL No 740 of 1999

WITH

CRIMINAL APPEAL No 774 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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GULAMRASUL JUMMABHAI FAQUIR

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Appeal No. 680 of 1999

MR JM PANCHAL for Appellant No.

MS HANSA PUNANI APP for Respondent No. 1

2. Criminal Appeal No. 740 of 1999

MS RV ACHARYA for Appellant No.

MS HANSA PUNANI APP for Respondent No. 1

3. Crimianl Appeal No. 774 of 1999

MS RV ACHARYA for Appellant No.

MS HANSA PUNANI APP for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA

and

HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 01/09/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

Criminal Appeal No.680 of 1999 has been preferred by Gulam Rasul Jimmabhai Faqir, original accused No.3, Criminal Appeal No.740 of 1999 has been preferred by Pankajbhai Babubhai Patel, original accused No.2 (through jail) and Criminal Appeal No.774 of 1999 has been preferred by Dashrathbhai Ratilal Rana, original accused No.1 (through jail), of Sessions Case No.133 of 1998, under sec.374(2) of the Code of Criminal Procedure, 1973, challenging the judgement and order of conviction dated 20th May, 1999 passed by the Additional City Sessions Judge, Court No.5, Ahmedabad in Sessions Case No.133 of 1998, convicting the appellants - original accused for the offences punishable under section 29(B)(ii) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act for short), and awarding rigorous imprisonment for 10 years and fine of Rs.1 Lac, upon each of the accused in default, simple imprisonment for one year, as stated in the impugned judgement and order of conviction.

2. Short facts of the prosecution case are as such that Mr.R.K. Bhatt, Police Inspector of Narcotic Cell, CID Crime, Ahmedabad had received the information on 8/2/1998 that one person who had put on brown pent and the shirt was proceeding in his auto-rickshaw bearing No.GRS - 761 from Maninagar Railway Station to Jay House with CHARAS and he was to give Charas to one person near Jay House. On receiving the said information, necessary entry to that effect was made into the relevant registers at about 12.15 p.m. and thereafter he had called two panchas and police personnel and also informed his superior officers in writing about the aforesaid secret information. Thereafter after appraising panchas and other members of the raiding party and after preparing primary panchnama, they all proceeded to Jay House to carry out raid as per the information received by him. On reaching Jay House, he along with other members of the

party were waiting in ambush and as soon as the rickshaw bearing No.GRS - 761 came near Jay House, one person who was waiting for the auto rickshaw and wearing trouser and white zabhbha immediately boarded the auto rickshaw. Thereafter, the rickshaw driver took out one plastic bag from the right-hand side of the pocket and gave it to the person who was sitting in the rickshaw. The raiding party immediately raided the auto rickshaw and caught hold of both the persons sitting in the auto rickshaw. Thereafter Mr.Bhatt gave his identification and and informed both the persons that he intend to carry out the search and asked both the persons that if they want to have search and seizure in presence of Magistrate or before the Gazetted Officer then he is ready to make necessary arrangement to that effect, but in reply they deny to do so and permitted Mr.Bhatt to carry out search and seizure in presence of two panchas and persons of the raiding party. Therefore, Mr.Bhatt carried out search of both the persons and while doing so, from the possession of the person wearing white trouser and zabhbha, one bag was found and on opening the same, CHARAS was recovered. Subsequently, the muddamal article seized from the said person were weighed in presence of panch witnesses by one head constable Hirabhai Patel and the weight of the said muddamal was to the extent of 200 gms. Thereafter, the Charas to the tune of 10 gms. each was segregated and the same was placed in the tin box bearing name BABOOL ZARDA and it was sealed in presence of panch witnesses by placing signature of the panch witnesses on the box. Subsequently, when the driver of the auto rickshaw was questioned, he gave replied that he had brought the Charas from one person named Gulam Hussain Alias Gullabhai, residing at Jamalpur area of Ahmedabad. Thereafter, the raiding party went to Jamalpur area near dispensary of Dr.Popatbhai. The driver of the auto rickshaw who had accompanied the raiding party, indicated the house of said Gulam Hussain Faquir. On reaching there, the members of the raiding party gave their identification and Mr.Bhatt, informed him that he wanted to have search of his house and if he so desire, he can make search either in presence of Magistrate or Gazetted Officer, but he refused to do so. Subsequently, Mr.Bhatt, along with the panch witnesses entered into the house and passed resolution under sec.42 of the NDPS Act and obtained signature of the accused No.3 as well as the panch witnesses and on the search being carried out, the accused NO.3 was found in possession of Charas. Hirabhai Patel, weighed the Charas in presence of panch witnesses and it weighed to the tune of 200 gms. Thereafter the Charas to the extent of 10 gms each was segregated from the above mentioned muddamal which was recovered from the

accused No.3 and it was placed in two different tin boxes and the same was sealed after placing the signatures of the panch witnesses. Thereafter, Mr.Khopade lodged the complaint against all the three accused under sections 8(c), 22 and 29 of the NDPS Act. Thereafter, the complaint, panchnama, accused, muddamal and report for registering the offence was sent to the concerned police station for registering the offence and same has been registered as CR No.5 of 1988 with the Gandhingar Zone Police Station and thereafter further investigation was started. The muddamal was sent for analyzing the same to the Forensic Science Laboratory (FSL) and at the end of investigation chargesheet was filed against all the accused and the case was registered as Sessions Case NO.133 of 1998. The same was came up before the learned Additional Sessions Judge, Court NO.5 and charge was framed against all the accused and as they pleaded not to guilty and prayed for trial, to prove the guilt of the accused, the prosecution has produced the following documentary evidence;

3. The report was prepared under sec.157 of the Code of Criminal Procedure and forwarded to the State Narcotic Cell, Ahmedabad Ex.40, complaint lodged by Mr.A.D. Khopade Ex.39, panchnama of the seizure of the muddamal Ex.23, resolution passed under sec.42 of the NDPS Act Ex.24, information received and forwarded to the higher officer Ex.22, copy of the seizure memo given to the accused Nos.1, 2 and 2 Ex.Nos.25, 26 and 27 respectively, information about the arrest given to the accused Nos.1, 2 and 3 Ex.28, 29 and 30, respectively, copy of the letter of the intimation given to the members of the family of the accused Nos.1, 2 and 3 Ex.Nos.31, 32 and 33, respectively, copy of the intimation letter forwarded to the superior officer Ex.34, intimation which was given to the Chief Metropolitan Magistrate Ex.35, letter written to the higher officer with regard to the successful raid Ex.36, copy of the letter written to the FSL, the receipt given by the FSL and the report of the FSL Ex.Nos.37, 44 and 46, respectively, entries made in the information register Ex.21, details with regard to the muddamal articles seized from the accused and written in the police diary Ex.42, extract of the station diary Ex.41.

4. The prosecution has also examined the following witnesses;

[1] Udaysing Panduram Maratha, PW No.1 Ex.18,
[2] Jagatsing Maganji Thakore, PW No.2 Ex.19,
[3] Ravindrakumar Kashiram Bhatt, PW No.3, Ex.20,

[4] Anilrao Dattajirao Khopade, PW No.4, Ex.38,
[5] Balvatnsing Nansing Parmar, PW No.5 Ex.43,
[6] Pathak Markanth Kantilal, PW No.6, Ex.45,
[7] Hirabhai Meghabhai Patel, PW No.7, Ex.47,
[8] Hasmukhbhai Keshavlal Chauhan, PW No.8, Ex.48 and
[9] Hirabhai Laljibhai Kapadia, PW No.9, Ex.50.

5. On submission of closing purshes, on behalf of the prosecution, further statement of the accused under sec.313 of the Code of Criminal Procedure was recorded.

6. The learned trial judge after having heard the learned counsel for the respective parties and considering the evidence on record, convicted the appellants - original accused as aforesaid, which gave rise to prefer this appeal.

7. We have heard Mr.JM Panchal for the appellant of Criminal Appeal No. 680 of 1999, and Ms.RV Acharya, for appellants of Criminal Appeal Nos.740 and 774 of 1999 (both through jail) and Ms.Hansa Punani, learned APP for State at length.

8. Mr.Panchal and Ms.Acharya, learned counsel for the appellants - original accused have mainly argued that the prosecution has failed to prove the guilt against the accused beyond reasonable doubt; the trial court has not properly appreciated the evidence on record; the trial court ought to have considered the fact that the independent witnesses PW No.1 Ex.18 - Udaysing Panduram Maratha and PW No.2, Ex.19 - Jagatsing Maganji Thakore have not supported the case of the prosecution and therefore, the trial court ought not to have relied upon the testimony of the interested police officers and ought not to have convicted the accused. It has also been argued that while doing search and seizure, the prosecution has failed to comply with the mandatory provisions of the NDPS Act. It is further argued that sec.42 of the NDPS Act is mandatory in nature and therefore, the information is required to be reduced in writing and sent to the superior officer forthwith. To substantiate the arguments, out attention is drawn to the evidence of PW No.3, Mr.Bhatt, P.I., more particularly cross-examination and argued that Mr.Bhatt has categorically stated that he has received the information at 12.45 p.m. and he took about 10 minutes time to reduce the same in writing; Mr.Bhatt has further admitted that he has informed his superior officers and thereafter, he has reduced the information in writing and therefore, it cannot be said that the information has been reduced in writing forthwith. It is further argued

that the said time has been shown just to make show of compliance of sec.42 of the NDPS Act and therefore, there is breach of the provisions of Sec.42 of the NDPS Act and hence, the trial court ought to have acquitted the accused on the ground of noncompliance of mandatory provisions of NDPS Act. It has also been argued that the prosecution has not examined superior officers to show that the information received by the Police Inspector was sent to him forthwith. It has been further argued that so far as accused No.3 is concerned, there is total noncompliance of sec.42(2) of the NDPS Act, for which he has further argued that the accused No.2 disclosed that he had received Charas from the accused No.3 and other quantity of Charas was available with the accused No.3. This information qua accused No.3 was given and was received by the raiding party and it was the duty under sec.42 of the Act to reduce the same in writing and sent the same information to the superior officer. There is no iota of evidence showing that the information given by the accused Nos.1 and 2 qua respondent No.3 to the raiding party was reduced in writing; and any information was sent to the superior officer forthwith. Thus, there is breach of Sec.42 of the NDPS Act. It has been further argued that there is breach of Sec.50 of the NDPS Act qua accused No.3 inasmuch as though it has been tried to prove by the prosecution that the accused was given option in writing regarding his valuable right being search and seizure before the Magistrate or Gazetted Officer, but in fact, the prosecution has failed to prove the same and therefore, there is breach of sec.50 of the NDPS Act. It has been argued that the prosecution has not proved that there were no chances of tampering with the muddamal and failed to establish that after seizure of the muddamal, the same was kept in safe custody and there was no chances of tampering from seizure till the same reaches to the FSL and there were no possibility of tampering with the muddamal.

9. Ms.Hansa Punani, learned APP for State has strongly opposed the appeals and vehemently argued that as soon as Mr.Bhatt received the secrete information, there are evidence on record to show that the same has been reduced in writing and superior officer was also informed regarding the secrete information. In support of the arguments, she has took us through the relevant evidence. It has also been argued that before going for raid, preliminary panchnama was also prepared into the Police Station and before making search and seizure of the accused, the prosecution agency has given an opportunity to avail his valuable rights to have search and seizure either before the Magistrate or before the

Gazetted Officer. Drawing out attention to the relevant evidence, it has been argued that it can not be said that there is breach of sections 42 and 50 of the NDPS Act. She has fairly admitted that it is true that sections 42 and 50 are mandatory one. However, she has argued that the provisions of the said mandatory sections have been complied with by the prosecution and there is no breach of sections 42 or 50 as alleged. She has further argued that it is true that both the Panchas have been declared hostile and they have not supported the case of the prosecution in toto, but the prosecution proved the case through the evidence of police witnesses, and the evidence of the police officer, merely because the panchas have turned hostile, cannot be discarded and it can not be said that the police officers are interested witnesses. She has further argued that the court below, after scrutinising the evidence of police officer, has placed reliance on the evidence of police witnesses. Drawing out attention to the oral evidence of police witness, she has argued that the evidence on the police witnesses is trustworthy and the court below has rightly believed the same. She has also drawn out attention to relevant evidence and argued that after search and seizure the muddamal remained intact and same muddamal reached to the FSL and the FSL analised the same muddamal sent by the investigating agency seized from the accused and therefore, there are no chances of tampering with the muddamal. At the end of the arguments, she has submitted that Ms.Hansa Punani, learned APP for State has mainly argued that the impugned judgement and order is well reasoned and same have been delivered by the court below after considering the entire evidence on record and hence no interference is called for.

10. We have gone through the reasoned judgement and order of conviction passed by the court below along with the documentary as well as oral evidence on which the learned counsel for the respective parties have relied upon, more particularly evidence of nemely Udaysing Panduram Maratha, panch witness, PW No.1, Ex.18, Jagatsing Maganji Thakore, second panch witness, PW No.2 Ex.19, and Ravindrakumar Kashiram Bhatt, PI Narcotic Cell, CID Crime, Gujarat State, PW No.3, Ex.20, who received the secrete information and conducted raid, Anilrao Dattajirao Khopade, PI PW No.4, Ex.38, Balvatnsing Nansing Parmar, PW No.5 Ex.43, Pathak Markanth Kantilal, PW No.6, Ex.45, Hirabhai Meghabhai Patel, PW No.7, Ex.47, Hasmukhbhai Keshavlal Chauhan, PW No.8, Ex.48 and Hirabhai Laljibhai Kapadia, PW No.9, Ex.50.

11. The aforesaid persons are witnesses of search and seizure through whom, the prosecution has tried to prove the search and seizure. It is true that both the panch witnesses have not supported the case of the prosecution, and they have been declared hostile but at the same time, they have admitted their signature as panch over the muddamal. But the fact remains that the prosecution has proved the case through other witnesses namely Mr.Bhatt, Khopade and other police personnels and through documentary evidence. It has been established from the documentary evidence and the oral evidence that the information received by Mr.Bhatt is reduced in writing by him and the same has been proved by way of evidence of Ex.21, which shows that the information received by him is reduced in writing by himself and he has informed his superior officers regarding the same which has been proved by him by way of evidence of Ex.22. The police personnels have been thorough cross examined by the learned counsel for the accused, but nothing has been come out and the prosecution has proved the guilt beyond reasonable doubt on the basis of oral as well as documentary evidence. On going through the evidence, it appears that all the requirement of mandatory provisions of the NDPS Act have been fulfilled by the prosecution. Further, while doing search and seizure, the mandatory provisions of Sections 42 and 50 of the NDPS Act has been fulfilled and there is no beach of either section 42 or sec.50 of the NDPS Act. The secret information has been reduced in writing and the superior officers have also been informed regarding the same. So far as the arguments of Mr.Panchal that at the time of search of the accused No.3 mandatory provisions of Sec.42 have not been complied with is concerned, in my opinion, it was continuous process wherein during the course of interrogation of accused Nos.1 and 2, information regarding accused No.3 was received by the investigating agency and on going to the house of the accused No.3 in company with the accused Nos.1 and 2, on proper search and seizure, muddamal was also found from the respondent No.3 and therefore, it cannot be said that there is any breach as argued, as it is continuous process. In such circumstances, the question of reducing the informations given by the accused Nos.1 and 2 regarding accused No.3 does not arise and hence, the arguments on this point is not acceptable. So far as provisions of Sec.50 is concerned, it becomes crystal clear from the FIR, panchnama and other evidence of the witnesses who have taken active part in the search and seizure that the prosecution has proved the search and seizure beyond reasonable doubt. Further, before search and seizure of the respondent No.3, resolution under sec.42 has also

been passed and signature of the respondent No.3 has also been received on it and accused No.3 was also asked regarding his valuable rights to have search either before the Magistrate or before the Gazetted Officer and therefore, it cannot be said that there is breach of provisions of Sec.42 or 50. So far as other evidence on record is concerned, it has been established that the muddamal received from the accused after following the mandatory provisions of the NDPS Act was handed over to the concerned police personnel, and in turn it was handed over to the concerned persons for keeping the same in safe custody and there is evidence showing that the muddamal in question which was seized from the accused was sent for FSL at the earliest and same muddamal was analised by the FSL and nothing contrary has been come out from the cross-examination of the witnesses. Further, after seizure of the muddamal in question from the accused, the same was kept in safe custody in intact condition and thereafter, the same muddamal was sent for analyses and the same muddamal has been analised by the officers of the FSL. Even there is evidence showing that the muddamal received by the officers of the FSL was in intact condition and the officers of the the FSL opined that the muddamal sent for analysis is contraband substance. Under the circumstances, the court below has rightly held that the muddamal was received after following the mandatory procedure; the same was remained in safe custody; the same were sent for FSL; the FSL received the same in intact condition and there were no possibility of tampering with the same and in view of the report of the FSL, the muddamal seized from the accused is contraband article.

12. In view of the above, it is clear that the prosecution has proved the case beyond all reasonable doubt and the trial court, after considering the evidence on record, has rightly convicted and hence no interference is required.

13. In the result, these appeals are dismissed.

(R.P. DHOLAKIA,J.)

(S.D. DAVE,J.)

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